PROTECTING THE INTERESTS OF CHILDREN IN CUSTODY PROCEEDINGS: A PERSPECTIVE ON TWENTY YEARS OF THEORY AND PRACTICE IN THE APPOINTMENT OF GUARDIANS AD LITEM

INTRODUCTION

Guardians ad litem differ from general guardians in that they are not responsible for the general care and supervision of either the person or the estate of their ward or both. They are, rather, guardians of special or limited powers appointed by a court to prosecute or defend for an infant in any proceeding to which he may be a party.

The concept of a guardian ad litem dates back to the early Roman and English common law systems, under which such guardians were appointed for the protection of infants or incompetents involved in specific court proceedings. Traditionally, a child had to be a party to an action before he could be afforded the protection of a guardian ad litem. Around 1956, however, a novel application of the concept was suggested by legal commentators who felt that such guardians might be used to protect the independent interests of children in custody-related cases wherein they were not considered formal parties.

In some jurisdictions courts still adhere to the traditional restrictions concerning the appointment of guardians ad litem. However, for reasons which will be discussed, many states now au-

2. Id.
6. See Cochran v. Cochran, 49 Ala. App. 178, —, 269 So. 2d 884, 895 (1970), in which the Alabama Court of Civil Appeals declared that since children are not parties to a divorce suit between the parents, appointment of a guardian is not necessary; In re Adoption of a Female Infant, 237 A.2d 468, 469-70 (D.C. 1968), in which the court stated that an adoption proceeding is ex parte and that since children are not necessary parties, they need not always be represented by a guardian ad litem. See also In re Anonymous, 25 App. Div. 2d 350, —, 269 N.Y. S.2d 653, 655-56 (1966). In the latter case, involving a paternity proceeding, the Supreme Court of New York, Appellate Division, also felt that appointment of a guardian for the child was not needed, since he was not a necessary party.
authorize appointment of guardians in cases where a child is not a party to the action, but in which his welfare and interests are nevertheless at stake.\textsuperscript{7} Such cases include the divorce, custody, neglect and child-abuse proceedings examined in this comment. In view of their expanded use today, guardians ad litem can best be defined as persons, generally attorneys, who have been appointed by a court, either at its discretion or pursuant to a statutory mandate, to represent a minor, an incompetent, or an unknown person whose interests may be affected by the judicial proceeding.\textsuperscript{8}

The purpose of this comment is to outline the development of the concept of appointing guardians ad litem in neglect, child-abuse, divorce and other custody-related proceedings, to examine the current practice of appointing guardians, and to discuss some of the strengths and weaknesses of such appointments in light of past experience. Special attention will be directed toward Nebraska law concerning guardians ad litem.

**PRACTICAL AND THEORETICAL CONSIDERATIONS**

A court's decision to appoint a guardian ad litem in a custody-related case is based on its expectation that such a guardian not only will protect the child's fundamental rights, but will also assist the court in formulating the best solution for the child.\textsuperscript{9} The following two sections contain a discussion of the principal considerations which led both courts and legislatures to the realization that children involved in custody-related proceedings are in need of, and have a right to the protection of their independent interests, and that such interests can best be protected by the appointment of a guardian ad litem.

**RECOGNIZING THE RIGHTS OF CHILDREN**

The judicial recognition that children have both personal and legal rights that are entitled to protection is a rather recent phenomenon. "The law has been slow in articulating the rights of children as rights," noted one commentator, "but the movement is

\textsuperscript{7} See, e.g., notes 91-101 and accompanying text infra.
\textsuperscript{8} Solender, supra note 3, at 619.
\textsuperscript{9} Speca & Wehrman, Protecting the Rights of Children in Divorce Cases in Missouri, 38 U.M.K.C. L. Rev. 1, 6 (1969). In Dees v. Dees, 41 Wis. 2d 435, --, 164 N.W.2d 282, 287 (1969), the Supreme Court of Wisconsin directed the lower court to appoint a guardian ad litem on remand, and pointed out that appointment of a guardian in that case would have aided the trial court in fully considering whether the welfare of the child might not be best served by his remaining in the foster home.
unmistakably in that direction.”

One of the first manifestations of the emerging recognition of children’s rights in our legal system was the compilation of several versions of a Bill of Rights for children. Of these probably the most significant was that prepared by Judge Hansen of the Wisconsin Supreme Court. The “rights” listed in the Bill were based upon Wisconsin Appellate Court decisions. This Bill of Rights is considered so important in Wisconsin that a copy is given to all parties petitioning for a divorce in that state. The Bill contains the following rights for children:

I. The right to be treated as an interested and affected person and not as pawn, possession or chattel of either or both parents;

II. The right to grow to maturity in that home environment which will best guarantee an opportunity for the child to grow to mature and responsible citizenship;

III. The right to the day by day love, care, discipline and protection of the parent having custody of the children;

IV. The right to know the non-custodian parent and to have the benefit of such parent’s love and guidance through adequate visitations;

V. The right to a positive and constructive relationship with both parents, with neither parent to be permitted to degrade or downgrade the other in the mind of the child;

VI. The right to have moral and ethical values developed by precept and practices and to have limits set for behavior so that the child early in life may develop self-discipline and self-control;

VII. The right to the most adequate level of economic support that can be provided by the best efforts of both parents;

VIII. The right to the same opportunities for education that the child would have had if the family unit had not been broken;

10. Speca & Wehrman, supra note 9, at 3.
12. Levin, supra note 5, at 356 n.88.
13. Id.
IX. The right to periodic review of custodial arrangements and child support orders as the circumstances of the parents and the benefit of the child may require;

X. The right to recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare, including where indicated, a social investigation to determine, and the appointment of a guardian ad litem to protect their interests.14

A further indication of the increased acceptance of children’s rights is evidenced by recent custody decisions. Under the old English common law rules a father had a primary right to the custody of his children.15 In the United States, this rule has always been tempered and qualified in the interest of the child;16 today, it has been qualified to such a degree that children under eighteen years of age are generally considered wards of the court, and therefore, a court renders that decision which will be most favorable to the child. Courts rely on the principle of the “welfare of the child” or the best interest of the child.17 In theory, this principle governs all custody decisions.18 It is a standard difficult to define, but in spite of the lack of settled standards as to what constitutes the child’s best interests, some general guidelines do exist. For example, in the case of State v. Boiler,19 the Nebraska Supreme Court indicated that the question involves a study of the proposed home and its surroundings; it involves an assessment of the child’s temporal welfare including provisions for food, clothing and discipline, and, if the child is of tender years, provisions for careful nursing and medical care when required; it also involves his spiritual and religious care and upbringing, and a determination as to whether he will have loving care, with understanding and affection.20 Similar guidelines exist in other jurisdictions.21

14. Id. at 356-57 n.88.
17. The terms are often used interchangeably. See, e.g., note 23 infra.
20. Id. at 465, 67 N.W.2d at 431.
21. See, e.g., Ridgeway v. Walter, 281 Ky. 140, —, 133 S.W.2d 748, 750 (1939), in which the Kentucky court suggested the following factors should be considered in deciding the best interest of the child: mutual affection between the child and the potential custodian, the physical, mental, moral and financial ability of the custodian to provide the child with the best schools, churches, moral atmosphere and other conditions conducive to the best development of the child. In In re Guardian-
A question of paramount importance to this discussion is what weight should be given by the courts to a child's best interests, especially when measured against any rights a parent may have over the custody of his child. The general position of most courts is that the best interests of the child should be the determinative factor. This is not to say that a parent's rights shall be overlooked, for the right of a natural parent to its child must be included with that bundle of rights associated with marriage, establishing a home, and raising one's child; as such, it should be viewed as "so rooted in the tradition and conscience of our people as to be ranked as fundamental." Indeed, it has been held that courts may not properly deprive a parent of the custody of his minor child unless it can be affirmatively shown that the parent is not fit to perform the duties imposed by the relationship, or that he has forfeited his right to custody.

Even such well-established rights are being shaken under the impact of the best interest test. In Liebsack v. Liebsack the mother argued that she should be granted custody of the child because she was not shown to be unfit. She further argued that since the custody dispute involved a parent and third persons, the Supreme Court of Montana suggested that the following factors should be considered:

1. the wishes of the child's parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
4. the child's adjustment to his home, school, and community; and
5. the mental and physical health of all individuals involved.

Id. at —, 566 P.2d at 397.


State v. Blanco, 177 Neb. 149, 155, 128 N.W.2d 615, 619 (1964) (quoting Raymond v. Cotner, 175 Neb. 158, 120 N.W.2d 892 (1963)).

190 Neb. 265, 267, 256 N.W.2d 130, 130 (1977).

In this case the "third persons" were the child's paternal grandparents.
determination of custody must be made in the best interest of the child with due regard for the superior rights of a fit, proper, and suitable parent. Although the court conceded that the mother was never determined to be an unfit parent, it granted her continued visitation rights, while leaving custody of the child with the paternal grandparents. The court concluded that this would be in the best interest of the child who had been living with the grandparents during the past four years, and was loved and disciplined by them as if he were their own son. The court felt that continued custody by the grandparents would provide the most stable environment for the child.

Although strictly limited to juvenile court proceedings, another major breakthrough in the area of children's rights occurred with the United States Supreme Court's decision in *In re Gault*. In that case the Court held that juveniles who were charged with being delinquents and faced possible commitment to a state institution were entitled to the right to counsel, the right to notice of charges, the right to confrontation and cross-examination of witnesses, and the right to the privilege against self-incrimination. Prior to *Gault*, children in juvenile court proceedings were not guaranteed the protections of the fourteenth amendment due process clause. They were, rather, subjected to juvenile proceedings "in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and

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28. 199 Neb. at 267, 258 N.W.2d at 130.
29. *Id.* at 267, 258 N.W.2d at 130.
30. *Id.* at 269, 258 N.W.2d at 131. A similar result was reached in Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) in which the Iowa Supreme Court denied the father's habeas corpus petition for custody of his son. The court decided to leave custody of the child with the maternal grandparents. In his opinion, Judge Stuart wrote:

Mark has established a father-son relationship with Mr. Bannister, which he apparently had never had with his natural father. He is happy, well adjusted and progressing nicely in his development . . . . Regardless of our appreciation of the father's love for his child and his desire to have him with him, we do not believe we have the moral right to gamble with this child's future. *Id.* at 158.
32. *See In re Gault*, 387 U.S. 1, 33, 41, 55-57 (1967). In *Gault*, the Supreme Court of Arizona had dismissed the petition for writ of habeas corpus filed by the parents of a 15-year old boy who had been committed as a juvenile delinquent to a state industrial school for an indeterminate sentence. The Supreme Court reversed the dismissal because the due process protections had been denied. *Id.* at 4.
33. From the beginning of the juvenile court system, there have been wide differences tolerated between the procedural rights accorded to adults in criminal court and those accorded to minors in juvenile court. For example, it has been held that the minor in juvenile court is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. 387 U.S. at 14.
admonition, and in which, in extreme situations benevolent and
wise institutions of the state provided guidance and help to save
him from a downward career.\textsuperscript{34} Oftentimes the results of such
proceedings were far from equitable. An early Nebraska case,
\textit{Roberts v. State},\textsuperscript{35} is illustrative. In that case, a child was commit-
ted to an industrial school for an indeterminate sentence merely
for swearing in church. The adult penalty for the offense was a
fine not exceeding one dollar. In committing the child to the
school, the court explained that it was not punishing the child, but
that commitment would provide the child with the needed refine-
ment and culture.\textsuperscript{36} Clearly, then, it appears that the efforts of a
kindly judge do not adequately safeguard the rights of the child in
all cases. As a result of the \textit{Gault} decision, the doctrine of parens
patriae\textsuperscript{37} can no longer be invoked to deny children the protection
of the fourteenth amendment now mandated by the United States
Supreme Court.\textsuperscript{38}

\textbf{CRITICIZING THE JUDICIAL PROCESS}

Another factor which influenced the courts and legislators to
seek the protections of a guardian ad litem was the realization that
both the juvenile court system and the adversary system of divorce
and custody proceedings were not well-suited to the protection of a
child's interests. The shortcomings and consequences of pre-
\textit{Gault} juvenile court proceedings have already been discussed.\textsuperscript{39}
As one commentator stated, implicit in \textit{Gault} was the conclusion
that the legal rights of children in delinquency hearings are not
necessarily safeguarded by a “Big Brother” judge.\textsuperscript{40}

As to divorce and custody-related proceedings, the problems
are twofold. First, in our legal system custody proceedings are ad-
versary in nature; they are a contest for the custody of the child.
However, this adversary system is particularly unsuited to the pro-

\textsuperscript{34} 387 U.S. at 26. However, such thinking disregarded the realities of the situ-
ation. Such institutions, no matter how euphemistically titled, deprive the youth of
his freedom for an indeterminate time. “His world,” Mr. Justice Fortas observed,
“becomes a building with white washed walls, regimented routine, institutional
hours . . . .” Instead of mother and father and sisters and brothers and friends . . .
his world is peopled by guards, custodians, . . . and ‘delinquents’ confined with him
for anything from waywardness to rape and homicide.” \textit{Id.} at 27.
\textsuperscript{35} 82 Neb. 651, 118 N.W. 574 (1908).
\textsuperscript{36} \textit{Id.} at 654-57, 118 N.W. 575-76.
\textsuperscript{37} Parens patriae refers to the state's sovereign power of guardianship over
persons under disability such as minors, incompetents and insane persons.
\textit{BLACK'S LAW DICTIONARY} 1269 (Rev. 4th ed. 1968).
\textsuperscript{38} Levin, \textit{supra} note 5, at 354.
\textsuperscript{39} See notes 36-37 and accompanying text \textit{supra}.
\textsuperscript{40} Levin, \textit{supra} note 5, at 354.
The competing parties in the proceeding are represented by attorneys, whose success rests on obtaining a decision most favorable to the client. In this regard, it has been stated:

Although the adversary system is admirably suited to ascertaining truth in a two-sided controversy where credibility may be the main issue, the question remains whether this system is the most appropriate for solving a three-sided problem where one of the three sides involves a fundamentally interested and vulnerable minor child.

Without meaningful representation of the child's interests, the adversary system cannot properly effectuate the legal test of what is in the best interest of the child. Even where the parties have entered into a custody agreement, the result can still be detrimental to the child's best interests. A court may be tempted to sanction such agreements without any further inquiry; however, as one commentator has so aptly illustrated, there may be hidden dangers in such tactics:

Suppose a father had been previously convicted of carnal knowledge of his 14 year old daughter, or had been indicted, tried and found not guilty, or had not been criminally accused but the daughter had complained to her mother to no avail. The parents might agree, through counsel, that the father shall have custody of the daughter. Should not someone then, at least, have the right of inquiry?

The second problem in custody-related cases involves the frequent incompatibility of the child's interests with those of the actual parties seeking his custody. Children often become pawns or prizes in such proceedings and can become victims who “are

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41. See, e.g., Barth v. Barth, 12 Ohio Misc. 141, —, 225 N.E.2d 866, 867 (C.P. 1967), in which the court said that a child, by definition, is inherently unequal in the adversary process which contemplates a contest of reasonably equal parties.
42. Levin, supra note 5, at 342.
43. Id. at 349.
44. Id. at 342-43.
45. Id. at 348.
46. Id. at 348, n.41.
47. It is well recognized by this court, and given legislative recognition in some states . . . that in some divorce cases, the interests of the minor children are, or may be, substantially different from either or both of the parents. As a matter of fact, the best interest of the children may be antagonistic to the desires of either or both parties. Barth v. Barth, 12 Ohio Misc. 141, —, 225 N.E.2d 866, 867 (1967). Courts have also acknowledged that such differences exist in adoption proceedings, see, e.g., Drummond v. Fulton County Dep't of Family & Social Serv., 532 F.2d 1001, 1002 (5th Cir. 1976), and in proceedings involving legitimacy, see, e.g., Ford v. Ford, 191 Neb. 548, 549-50, 216 N.W.2d 176, 177 (1974).
 unknowingly sentenced in some cases to an insecure and tormented childhood. Because the final determination of custody will have such a permeating impact on a child's future, he should be allowed to assert individual interests in his own right. However, these independent interests must be brought to the attention of the court. Therefore, a child needs someone to represent him, someone who is not a party to the legal contest for his custody.

Since the juvenile court system and the adversary system of custody proceedings appeared to lack built-in safeguards for protecting a child's best interests, primarily because there was no one to bring these interests to the attention of the court, and to defend them during the proceedings, a safeguard had to be sought outside the system itself. It was for these reasons that courts and legislators decided that an effective solution would be the appointment of a guardian ad litem.

LEGISLATIVE PROVISIONS FOR VARIOUS PROCEEDINGS

Recognizing the existence of a child's independent interests in various juvenile and family court proceedings, and the need to better protect those interests, states passed legislation pertaining to the appointment of guardians ad litem, “law guardians” or counsel in such cases. The following section, discussing statutory provisions, has been subdivided according to the nature of the proceedings.

CHILD ABUSE PROCEEDINGS

Due to the special need for protecting children who are victims of child abuse, most states passed legislation specifically dealing with the appointment of guardians in child abuse proceedings. Generally, legislation in this area provides the child with either an

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49. This determination will affect not only with whom and where he will live, but also the kind of school he will attend, and the values he will be taught. See Levin, supra note 5, at 351-52.
50. Foster & Freed, supra note 11, at 346.
51. See, e.g., the statutes cited in notes 54-58 infra. Most state statutes specifically refer to guardians ad litem. The New York Family Court Act uses the term “law guardian,” which includes only attorneys licensed to practice before the highest court. See Edelstein, The Law Guardian in the New York Family Court, 24 Juv. Just. 14, 15 (1973). Since the term guardian ad litem usually refers to attorneys or counsel, see definition in text accompanying note 8 supra, no distinction will be made in this discussion between the statutes using the various terms.
52. See Note, Appointment of Counsel for the Abused Child—Statutory Schemes and the New York Approach, 58 CORNELL L. REV. 177, 179-83 (1972) [hereinafter cited as Statutory Schemes]. See also Fraser, Independent Representation
absolute right to counsel, or with a discretionary or a non-absolute right to counsel.  

In the many states which passed legislation providing the victim of child abuse with an absolute right to counsel, appointment of a guardian ad litem is strictly mandatory; no discretion is allowed. For example, the South Dakota provision states:

The state's attorney, upon receipt of any report pursuant to § 26-10-12 [referring to oral reports of child abuse], shall forthwith investigate or request an investigation by the department of social services. Such investigation shall not prohibit any other lawful action as may be provided by law. If such investigation and report indicate that child abuse has occurred, the state's attorney shall commence an appropriate action forthwith, and the court shall immediately appoint counsel to represent the interests of the child.

The Federal Child Abuse, Prevention and Treatment Act also provides an absolute right to counsel for the abused child. Moreover, it expressly limits the availability of federal funds to finance state child-abuse prevention and treatment programs to states which require the appointment of a guardian for such proceedings.

Several states provide a child with either a discretionary or a non-absolute right to counsel in child abuse proceedings. The

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53. Statutory Schemes, supra note 52, at 180-83.
57. 42 U.S.C. § 5103(b)(2)(6) stipulates that in order to qualify for a grant, a state must provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child.
58. For examples of discretionary statutes, see ARIZ. REV. STAT. § 8-225(A) (Supp. 1977-78); and MONT. REV. CODES ANN. § 10-1310(10)(e) and (12) (Cum. Supp. 1977).
discretionary statutes empower but do not mandate courts to appoint a guardian ad litem when it appears to them that taking this action would be in the child’s interest, or when it seems otherwise necessary for the promotion of fairness and justice.\textsuperscript{59} One example of such a statute is the Montana provision which simply directs that “\textit{t}he court \textit{may} at any time on its own motion or the motion of any party appoint a guardian ad litem for the youth.”\textsuperscript{60}

On the other hand, the non-absolute right to counsel statutes do not leave appointment of a guardian solely to the discretion of the court. Such statutes are mandatory in nature, but the mandate applies only to certain limited cases.\textsuperscript{61} An example of such a provision is the Missouri statute, which requires appointment only if the proceedings will result in the child’s commitment to a state training school.\textsuperscript{62} It would seem that it is not unusual for a child to be placed in such facilities, both because of the need to immediately remove him from further physical danger, and because of the lack of other suitable facilities at such time.\textsuperscript{63} The Missouri statute directs that “[b]efore any juvenile shall be committed to the state board of training schools, he \textit{shall} have the opportunity to have and be represented by counsel at a hearing held for that purpose.”\textsuperscript{64}

**Divorce and Child Custody Proceedings**

Appointment of guardians ad litem in divorce and custody related proceedings is often left to the discretion of the courts.\textsuperscript{65} Such discretionary appointment is advocated by the Uniform Marriage and Divorce Act.\textsuperscript{66} However, mandatory appointment is advocated by a proposed Divorce Reform Act,\textsuperscript{67} which provides that

\begin{itemize}
  \item Statutory Schemes, supra note 52, at 182.
  \item See Statutory Schemes, supra note 52, at 182.
  \item See Mo. Ann. Stat. § 211.211 (Vernon 1959).
  \item It is probably for this reason that the Missouri provision has been included in a survey of non-absolute right to counsel statutes for abused children. See Statutory Schemes, supra note 52, at 182 n.27.
  \item Mo. Ann. Stat. § 211.211 (Vernon 1959) (emphasis added).
  \item Uniform Marriage and Divorce Act § 310 (1971). This provision states that a court \textit{may} appoint an attorney to represent the interests of a minor or dependent child regarding support, custody, or visitation.
  \item The act was proposed by the Harvard Student Legislative Research Bureau
\end{itemize}
children whose parents seek divorce are parties to the action and should be represented by counsel for the protection of their interests. Mandatory appointment is also favored by the version of the Uniform Marriage and Divorce Act adopted by the Family Law Section of the American Bar Association.

A few states have provisions which are mandatory in nature, yet allow the courts a limited degree of discretion regarding appointment. An example of such a provision is the Texas statute stating:

In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney ad litem has been appointed for the child or unless the Court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.

NEGLECT, DEPENDENCY, AND OTHER PROCEEDINGS

Many states authorize appointment of guardians ad litem in neglect, dependency, and other similar proceedings. Authorization for appointment in these cases is usually found in statutes directed at broader categories of proceedings such as juvenile court or child-abuse and neglect proceedings generally. These statutes may either require appointment, or leave it to the discretion and may be found in Bureau Projects, A Divorce Reform Act, 5 Harv. J. Legis. 563, 580 (1968). See Foster & Freed, supra note 11, at 356 n.43.


The most comprehensive provision in this area is the North Carolina statute pertaining to neglected children. The statute provides that in cases where the petition alleges that a child is neglected, "the court shall appoint a guardian ad litem to represent the child unless the court shall find as a fact that the child is not in need of and cannot benefit from such representation." The statute further provides that in such cases the duties of the guardian ad litem shall consist of: making an investigation to determine the facts, the child's needs, and the resources available within the family and in the community to meet those needs; and making an appearance on behalf of the child in the juvenile proceeding and performing all necessary and appropriate legal services for the child in order to present the relevant facts to the court at the adjudicatory stage and the possible options to the court at the dispositional stage of the hearing. The statute also indicates that, when necessary, the guardian will appeal from an adjudication or order of disposition to the court of appeals. In all cases, the guardian ad litem must be an attorney-at-law licensed to practice in the State of North Carolina.

In the absence of statutory authority specifically relating to neglect and dependency proceedings, courts may decide to appoint guardians in such proceedings on the basis of provisions generally aimed at cases involving the possible termination of parental rights. An example of such a provision is found in the Texas Family Code.

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76. Id.

77. Id.

78. Id.

79. Id.

In jurisdictions in which discretionary appointment of guardians ad litem is statutorily permissible, appellate courts delineate the limits within which discretion may be exercised soundly by the trial court. Excellent examples of such delineation can be seen in Broadstone v. Broadstone and Ford v. Ford, both Nebraska Supreme Court decisions discussed in the following section. Broadstone is an example of a decision by the trial court not to appoint a guardian which was upheld. However, there have been no appellate decisions criticizing a trial court's decision to appoint a guardian under such discretionary statutes.

Further examples of statutory interpretation by appellate courts can be found in Wisconsin decisions. In that state the pertinent statute was primarily mandatory in nature, yet left some latitude for the exercise of discretion. Until recently, the statute had provided that in any action for divorce, separation, annulment, or other action affecting marriage, "when the court has reason for special concern as to the future welfare of the minor children, the court shall appoint a guardian ad litem to represent such children." In at least two decisions under this earlier statute, the Wisconsin Supreme Court indicated that any discretion under the terms of the statute would be narrowly construed. For example, in Mawhinney v. Mawhinney the facts indicated that for a period of eight years, the father, who was seeking custody of his children, had illicitly lived with a woman, and had failed to provide the children with necessities or to display any interest in them. Even under these circumstances, the trial court apparently did not feel that the statute compelled the appointment of a guardian ad litem. However, the supreme court disagreed, and remanded the case for further proceedings with directions to appoint. In the other case, the Wisconsin Supreme Court vacated the lower court's order denying the motion to transfer custody to the ex-husband because a guardian had not been appointed. It held that the trial court had committed reversible error when it failed sua sponte to

83. See text accompanying notes 115-122 infra.
84. 190 Neb. at 302-03, 207 N.W.2d at 685.
85. See Wis. Stat. Ann. § 247.045 (Supp. 1978-79), which sets forth additional provisions effective in 1977 which would have statutorily mandated appointment in the cases discussed in the text following this note.
86. 66 Wis. 2d 679, 225 N.W.2d 501 (1975).
87. Id. at —, 225 N.W.2d at 504.
88. Id. at —, 225, N.W.2d at 505.
89. See Bahr v. Bahr, 72 Wis. 2d 145, —, 240 N.W.2d 162, 163 (1976).
appoint a guardian ad litem for the minor children.90 The supreme court cautioned that under the terms of the statute whenever there is a proceeding in which the trial judge is faced with the decision to continue present custody or to terminate it in favor of alternate custody, appointment of a guardian will be required, unless the petition for custody is merely frivolous.91

In the absence of enabling statutes, there are at least three states in which courts have ruled that they have inherent power to appoint a guardian ad litem for a child.92 As early as 1955, the Supreme Court of Wisconsin urged and sometimes insisted on the appointment of a guardian ad litem in disputed custody cases.93 The court justified its actions on the basis of its inherent powers to authorize such appointment. Judge Hansen succinctly summarized the court's position in an article when he wrote:

[W]e have relied upon the inherent power of the court to implement that 'concern for the welfare of the child' to which appellate courts in all states have so often referred . . . . It would be hard for me to believe that any appellate court anywhere, since the sole and only purpose of appointing a guardian ad litem is to make certain that the welfare of the minor children is properly represented and promoted, would deny to a trial court the right to take this affirmative step to protect the children's rights.94

In 1967, in Barth v. Barth,95 an Ohio court also authorized ap-
pointment of guardians ad litem in the absence of any statutory provisions. However, unlike the Wisconsin Supreme Court, which relied on its inherent powers for authorizing appointment, the Ohio court noted that children in divorce proceedings are parties to the action in the state of Ohio and are, therefore, entitled to representation by a guardian. Because of the importance of this decision, the court also outlined some of the duties of such guardians.

In 1968, the Rhode Island Supreme Court also established judicial authority for the appointment of guardians ad litem in Zinni v. Zinni, where it declared that in any judicial proceeding in which it appears that there are interests of a minor that need protection, the presiding judicial officer "has the inherent power to appoint a guardian ad litem for the protection of the minor's interests." By this statement of inherent power, the Rhode Island Supreme Court echoed the rationale followed in Wisconsin.

APPOINTMENT OF GUARDIANS AD LITEM IN NEBRASKA

In Nebraska there is statutory authority for the appointment of guardians ad litem in divorce cases involving custody as well as in neglect, dependency and delinquency proceedings. In addition, a statute was recently enacted specifically requiring ap-

96. See Judge Hansen's analysis at note 94 and accompanying text supra.
97. 12 Ohio Misc. at 225 N.E.2d at 867.
98. These duties include:
1. A determination as to the full extent of legal rights of these children in this case.
2. Advocacy of their rights concerning the merits of the divorce case.
3. Advocacy of their rights concerning the issue of their welfare while the case is pending.
4. Advocacy of their best interests in the matter of custody.
5. Advocacy in the matter of visitation.
6. Advocacy in the matter of support, including questions of provision for medical care and provisions for additional education—recognizing the responsibility, if any, of both parents in this matter.
Id. at 225 N.E.2d at 867.
100. Id. at 238 A.2d at 376.
101. See text accompanying notes 93 and 94 supra.
103. Neb. Rev. Stat. § 43-209(b) (Supp. 1976) states: "The court may . . . appoint a guardian ad litem, as may be deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county . . . ." Id.
pointment in divorce cases whenever termination of parental rights is placed in issue. In divorce cases involving custody, and in cases concerning neglect, dependency or delinquency, the appointment of a guardian is left to the discretion of the trial court, whereas, in cases involving termination of parental rights, appointment is mandatory.

In several recent cases, the Nebraska Supreme Court announced its position concerning the appointment of guardians ad litem in divorce cases involving the custody of children. In Pieck v. Pieck, the court stated that the district court in its discretion may appoint an attorney to protect the interests of any minor children of the parties and that any limits on discretion must evolve case by case. In Pieck, the supreme court found that the district court had erred in refusing to appoint a guardian ad litem for the children. The court felt that the wife's proposed plans to take the children out of state, coupled with the husband's specific request and ability to pay for such a guardian, should have influenced the court to appoint one; therefore, the court's refusal to appoint counsel for the children was not in the best interest of the children.

In Broadstone v. Broadstone, however, the supreme court upheld the district court's refusal to appoint a guardian ad litem. Since the transcript of the proceedings revealed a complete exploration of pertinent facts, such as the emotional problems and the day-to-day living conditions of the parties, the supreme court saw no reason for the added services of a guardian.

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Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children. Such guardian ad litem shall forthwith personally investigate the facts and circumstances on all matters pertinent to the best interests and welfare of the children. If it appears to the guardian ad litem that the best interests and welfare of the children may require the termination of the parental rights of one or both parents, he shall apply to the court in writing or orally on the record for such termination.

Id. § 1 at 91.

105. See notes 102-104 supra.


108. 190 Neb. at 420, 209 N.W.2d at 192.

109. Id.

110. Id.

111. Id.


113. Id. at 302-03, 207 N.W.2d at 685. The court stated: "The contention of the
In a third case, *Ford v. Ford*, the supreme court announced that the need for appointment of a guardian ad litem for children in divorce cases involving custody determinations would be weighed against such factors as the extra expense and delay that would ensue. The court stated:

We realize that in the trial of most divorce actions, adequate representation by counsel for the parties, and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.

However, the supreme court found that in the instant case appointment was indicated, since the proceeding also involved a finding of illegitimacy. Such a proceeding, the court said, "is one in which the two children, independent of the dispute between the parents, have a vital and enduring interest affecting their own life, which requires that they be independently protected by the court and the representation of counsel." Therefore, the case was remanded with directions to appoint a guardian ad litem.

From the foregoing it appears that the Nebraska Supreme Court will be reluctant to direct appointment of a guardian in the absence of necessitating factors such as questions of legitimacy in connection with the custody proceedings, or the threat of a child's being removed from the jurisdiction. The court's reluctance stems from its concern over expenses and delays, coupled with its belief that the investigative powers of the court will provide sufficient protection.

**FUNCTIONS OF THE GUARDIAN AD LITEM**

Very few functions of a guardian ad litem have been clearly...
defined, although some guidelines can be found in both statutes and case law. The guardian ad litem serves at least three main functions. Primarily as an attorney, he is the advocate and legal representative, who must protect and advance the best interests of the children. In this capacity he has all the rights and powers granted to attorneys at trial. Therefore, he should bring to this task all the usual tools of an attorney: knowledge of the applicable law, an ability to make a thorough investigation, and a capacity to present the pertinent facts logically and to argue his client's position forcefully and persuasively.

Secondly, the guardian ad litem must protect the general welfare of his client. In so doing, he acts as the child's guardian. In this capacity he works closely with the probation department or other social service agencies assigned to the case. However, as one writer has cautioned, in performing his role as a guardian, the lawyer should be mindful of the fact that he is not a trained social worker, and should not attempt to usurp the functions of or render the diagnostic services usually performed by the probation department or other agency utilized by the court. Neither should he forfeit common sense and accept a social evaluation of his client's needs without the critical skepticism needed to insure that the
analysis is based upon complete and accurate facts.\textsuperscript{131}

Finally, the guardian ad litem serves as an officer of the court. He must counsel and confer with the trial judge concerning all matters relating to custody and other issues.\textsuperscript{132} As one commentator explained:

Judicial protection of the welfare of the child requires that judges be provided with the fullest and most professional insights into these difficult and delicate problems. Without competent assistance, judges may be forced to rely on their personal notions of what is "decent," "moral" or "right" in determining what satisfies the "best interest" of the child. Thus, the primary responsibility of the guardian ad litem would be to accurately present the true needs of the child and, thereby, establish the "best interest" test or a suitable formulation for ensuring a child's welfare.\textsuperscript{133}

In order to assure the effectiveness of the services of a guardian ad litem, courts should provide the guardian ample opportunity to prepare and properly present his case. One commentator suggests that this should include the right to:

1. interview the parents or other interested parties;
2. confer with the children;
3. examine the social worker's report and recommendation;
4. request examination of the children and parents, or any of them, by a qualified psychiatrist or clinical psychologist or both;
5. locate and subpoena witnesses;
6. attend the hearing and put in such proof as may be necessary and desirable; and
7. make a recommendation to the court.\textsuperscript{134}

\textsuperscript{131} Isaacs, supra note 128, at 507.
\textsuperscript{132} Allen v. Allen, 78 Wis. 2d 263, —, 254 N.W.2d 244, 247 (1977). Although these conferences may give the judge a more accurate picture of custody-related matters, they do not solve the more difficult problem of admitting such information into evidence at trial, nor of preserving it on the record for review during subsequent appeal. See the discussion at note 134 infra.
\textsuperscript{133} Levin, supra note 5, at 362.
\textsuperscript{134} See Podell, supra note 93, at 108. In practice, these tools are not always available to the guardian ad litem. Interviews with Nebraska district court judges, see note 123 supra, revealed that the limitations imposed on the guardian's freedom to interview, subpoena, and introduce witnesses vary from court to court, even within the same jurisdiction. Such problems are particularly apparent in states such as Nebraska, in which the enabling statutes do little more than grant the trial judge the discretionary power of appointment. See, e.g., Neb. Rev. Stat. § 42-358 (Supp. 1976) set out at note 102 supra. Because the guardian is also an attorney he is generally barred from testifying as a witness. This, of course, raises the evidentiary difficulties stemming from the hearsay rule, and the trial courts are left with the problem of finding a solution, particularly where there is a concern for preserv-
The preceding list indicates the belief that it would be useless to appoint a guardian without providing him with the necessary "tools" with which to effectuate a meaningful representation of the child's interests.

CONCLUSION

Because of the legislative and judicial efforts of the last twenty years, the position of children in juvenile and custody proceedings has greatly improved. Children are less likely to be "victimized" by such proceedings. Today they are emerging as "persons" in the eyes of the law—persons, whose constitutional rights and independent interests have been afforded protection. The appointment of guardians ad litem has been, and is likely to remain, the principal mechanism for safeguarding these interests.

Although the appointment of guardians ad litem appears firmly entrenched in our legal system, experience has already pointed out some shortcomings. First, there is a growing concern that only the mandatory appointment of guardians ad litem can adequately safeguard the interests of the child. Oftentimes, the discretion allowed the trial courts by many statutes is simply not exercised often enough to guarantee protection of the child's interests.

Secondly, it should be noted that specialization in the area has been proposed. One writer has suggested that a public attorney specializing in the prosecution of children's cases should be

135. See Fraser, supra note 52, at 17; Levin, supra note 2, at 349; and Podell, supra note 93, at 109.

136. See Levin, supra note 5, at 362 n.118. In the words of another commentator, "it is not enough to merely confer discretion on the court to appoint counsel for children because experience shows that this will not be done. . . . [T]he mandatory appointment of a guardian ad litem for children should be a requisite. . . ." Podell, supra note 93, at 109. The commentator's observation was borne out by the information obtained during interviews with Nebraska trial judges. See note 123 supra. The general position of the district court judges interviewed was that appointment of a guardian need not be routinely made. Most judges do use the social services of either the Welfare Department or the Probation Department of the juvenile court to conduct custody investigations in routine divorce cases. The feeling is that the appointment of guardians would only duplicate work and add unnecessary delay and expense. However, guardians ad litem are appointed whenever custody is "hotly" disputed, reviewed, or when the children are taken into custody by the court.
Another has proposed that a special law clerk be assigned to the domestic relations, juvenile, or family court. Such a clerk would have to be a member of the bar, and have a thorough knowledge of the family law of the state, and in courts where custody is an adjunct to divorce, a knowledge of marital property and tax law and some basic accounting principles. His function would be limited to the reading of all the papers filed with the court, and the pointing out of all pertinent errors of fact to the judge. The primary source of outside help and information would continue to be the social case worker assigned by the court. A third commentator, rather hopefully, has written: "It may well be that such guardians ad litem will develop into a new breed of lawyer: 'lawyers trained in psychoanalytic child development and specializing in child-custody cases.'" Although some would view this as impractical and costly, it has been maintained that specialization may be the best method of determining what has been called the "least detrimental alternative" for the child.

This concept of developing a specialized "breed of lawyers" is apparently aimed at the inadequate performance of attorneys under the present system of appointments. However, it may be questioned whether such specialization might lead to a disregard of the three-fold functions of the guardian ad litem discussed previously by focusing upon only one of those functions.

Whatever shortcomings exist in the system of appointing guardians ad litem, and whatever innovations may be made in the future, it is unlikely that the practice will be discontinued, for to do so would be to take a step backwards—to re-enter the era where children were seen, but not heard.

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137. Statutory Schemes, supra note 52, at 189.
138. Solender, supra note 3, at 640.
139. Id.
140. Id.
141. Id.
142. Levin, supra note 5, at 363.
143. Id.
144. See text accompanying notes 126-133 supra.
145. See Foster & Freed, supra note 11, at 343.